

Delhi High Court

Delhi High Court

% Anand Bhushan vs R.A. Haritash on 29 March, 2012

*IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 29th March, 2012

+ LPA No.777/2010

% ANAND BHUSHANAppellant Through: Ms. Girija Krishan Varma, Adv.

Versus

R.A. HARITASH Respondent Through: Mr. P.S. Parma, Adv. for Mr. A.S.

Chandhiok, ASG/Amicus Curiae

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This Intra Court appeal impugns the order dated 26 th May, 2010 of the learned Single Judge allowing W.P.(C) No.3670/2010 preferred by the respondent. The respondent, at the relevant time was the Dy. Director of Education and Public Information Officer of the Directorate of Education, Govt. of NCT of Delhi. The respondent had filed the writ petition impugning the order dated 14th April, 2010 of the Central Information Commission (CIC) imposing maximum penalty of Rs.25,000/- on the respondent, under Section 20(1) of the Right to Information Act, 2005 for the delay of over 100 days in furnishing the information to the appellant. The Chief Secretary, Govt. of Delhi was directed to recover the said amount from the salary of the respondent @ `5,000/- per month.

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2. The learned Single Judge, vide order impugned in this appeal, reduced the penalty amount to `2,500/- recoverable from the salary of the respondent in ten equal monthly installments of `250/- per month. The learned Single Judge held that the question of penalty is essentially between the Court and the respondent and did not really concern the appellant who has been provided with the information. Yet another reason given for so reducing the penalty was that the respondent had taken charge of the said post 14 days after the subject RTI application of the appellant had been filed.

3. Notice of this appeal was issued primarily on the ground, that the learned Single Judge, being of the view aforesaid, had decided the writ petition even without issuing notice to the appellant, though the appellant had been impleaded as respondent in the writ petition. Hearing in this appeal was commenced on 11th March, 2011 when the following order was passed:- "Heard Ms. Girija Krishan Varma, learned counsel for the appellant and the respondent in person. In course of hearing of this appeal, Ms. Verma has raised the following contentions:-

(a) The learned single Judge has disposed of the writ petition without notice to the appellant, who had sought the information under the Right to Information Act, 2005 on the ground that the question of penalty is

essentially between the Court and the petitioner and does not really concern the respondents which makes the order vulnerable as the exposition of law in the said manner is contrary to the spirit of the 2005 Act.

(b) If, the language employed under Section 20 of the 2005 Act, which deals with penalties, is appropriately read it would clearly convey that every day's delay shall invite penalty of Rs.250/- with the rider that the said penalty shall not exceed Rs.25,000/- and the first proviso deals with grant of reasonable opportunity to bring the

LPA No.777/2010 Page 2 of 10 concept of natural justice and the second proviso requires reasonable diligence but if reasonable diligence is not shown, discharging regard being had to the onus of proof as engrafted in the said proviso, it is obligatory on the part of the Commission to impose penalty of Rs.250/- per day. Elaborating the said submission, it is contended by her that certain days' delay may be explained and some days' delay, if not explained, would invite the penalty which is mandatory because of the words used in Section 20 of the Act viz., "shall impose penalty"

(c) If there is penalty provision in the Act, the High Court in exercise of power of judicial review cannot reduce the said penalty unless a categorical finding is recorded that reasonable explanation has been proffered/offered for certain days. Pyramiding the said contention, it is put forth by Ms. Verma that the discretion by the Court is not attracted in exercise of power under Articles 226 or 227 of the Constitution of India unless the finding with regard to reasonable explanation as recorded by the Commission is reversed. (d) If the Court in exercise of power of judicial review is allowed to reduce the penalty that would frustrate the purpose of the Act which is a progressive legislation to introduce transparency in democracy for the purpose of good governance. In view of the issues raised, we would like to have the assistance of the learned Solicitor General in the matter. Let the matter be listed on 3rd May, 2011 at 2.15 pm. Ms. Zubeda Begum, learned counsel for the State undertakes to apprise the learned Solicitor General about the order passed today. A copy of the order be given dasti under signature of the Court Master to Ms. Zubeda Begum."

4. The matter was thereafter adjourned from time to time.

5. We have however recently vide our judgment dated 9 th January, 2012 in LPA 764/2011 titled Ankur Mutreja v. Delhi University held that; a). the Act does not provide for the CIC to, in the penalty proceedings, hear the information seeker, though there is no bar

LPA No.777/2010 Page 3 of 10 also thereagainst if the CIC so desires;

b). that the information seeker cannot as a matter of right claim audience in the penalty proceedings which are between the CIC and the erring information officer;

c). there is no provision in the Act for payment of penalty or any part thereof imposed/recovered from the erring information officer to the information seeker;

d). the penalty proceedings are akin to contempt proceedings, the settled position wherein is that after bringing the facts to the notice of the Court, it becomes a matter between the Court and the contemnor and the informant or the relator does not become a complainant or petitioner in contempt proceedings.

6. The aforesaid judgment was brought to the attention of the counsel for the appellant. The counsel for the appellant has however besides orally arguing the matter also submitted written submissions. Her arguments may be summarized as under:-

i). that the use of the word "shall" in Section 20(1) is indicative of, the imposition of penalty being mandatory, where the information officer has refused to or delays in receiving the RTI application or when does not give or delays in giving the information sought;

ii). that the presence of the information seeker is essential not only for computing the penalty but also for establishing the default of the information officer;

LPA No.777/2010 Page 4 of 10 iii). that the penalty proceedings under Section 20(1) are adversarial in nature;

iv). that the position of the information seeker, in penalty proceedings, is akin to that of public prosecutor;

v). that since Section 20(1) provides for a hearing to be given to the information officer, there can be no hearing without the information seeker;

vi). the second proviso to Section 20(1), putting the burden of proving that he acted reasonably and diligently, on the information officer is also indicative of the penalty proceedings being adversarial in nature; if the information seeker was not to be a party to the said proceedings, the question of onus/burden would not have arisen; the question of shifting the burden arises only in an adversarial situation;

vii). that the role of CIC is only that of an Adjudicator;

viii). that exclusion of the information seeker from penalty proceedings would dilute the spirit of the Act;

ix). that the Act is not only about sharing of information and promoting transparency but is also intended to bring about accountability and taking away the right of the information seeker to participate in the penalty proceedings is against the principle of accountability;

LPA No.777/2010 Page 5 of 10 x). Section 23 of the Act bars the jurisdiction of Courts; the information seeker thus has no other remedy against the erring information officer.

7. The counsel for the appellant has also handed over a compilation of the following judgments:-

(i). Surya Dev Rai v. Ram Chander Rai (2003) 6 SCC 675; (ii). Nathi Devi v. Radha Devi Gupta (2005) 2 SCC 271; (iii). The State of U.P. v. Raj Narain (1975) 4 SCC 428; (iv). Bhagat Singh v. Chief Information Commissioner 146(2008) DLT 385 &

(v). Sree Narayana College v. State of Kerala MANU/KE/0238/2010.

and of certain Articles, Parliamentary debates etc. on the Act.

8. We have in Ankur Mutreja (supra) given detailed reasons for the conclusions aforesaid reached therein and which cover contentions 6(ii) to (viii) & (x) aforesaid of the counsel for the appellant herein and we do not feel the need to reiterate the same. We may only add that the role of the CIC, under the Act, is not confined to that of an Adjudicator. The CIC under the RTI Act enjoys a dual position. The CIC, established under Section 12 of the Act, has been, a) under Section 18 vested with the duty to receive and enquire into complaints of non-performance and non-compliance of provisions of the Act and relating to access to records under the Act; b) empowered under Section 19(3) to hear second appeals against decision of Information Officer and the First Appellate Authority; c) empowered under Section 19(8) to,

LPA No.777/2010 Page 6 of 10 while deciding such appeals, to require any public authority to take such steps as may be necessary for compliance of provisions of the Act; and, d) and is to, under Section 25 of the Act prepare annual report on the implementation of the provisions of the Act. The CIC thus, besides the adjudicatory role also has a supervisory role in the implementation of the Act.

9. The power of the CIC, under Section 20, of imposing penalty is to be seen in this light and context. A reading of Section 20 shows (as also held by us in Ankur Mutreja) that while the opinion, as to a default

having been committed by the Information Officer, is to be formed at the time of deciding any complaint or appeal, the hearing to be given to such Information Officer, is to be held after the decision on the complaint or the appeal. The proceedings before the CIC, of hearing the Information Officer qua whom opinion of having committed a default has been formed and of imposition of penalty, are in our opinion, in the exercise of supervisory powers of CIC and not in the exercise of adjudicatory powers. As already held by us in *Ankur Mutreja*, there is no provision, for payment of penalty or any part thereof, to the information seeker. The information seeker has no locus in the penalty proceedings, beyond the decision of the complaint/appeal and while taking which decision opinion of default having been committed is to be formed, and at which stage the complainant/information seeker is heard.

10. The Supreme Court in Competition Commission of India vs. Steel Authority of India Ltd. (2010) 10 SCC 744 held that the Competition Commission constituted under the Competition Act, 2002 discharges

LPA No.777/2010 Page 7 of 10 different functions under different provisions of the Act and the procedure to be followed in its inquisitorial and regulatory powers/functions is not to be influenced by the procedure prescribed to be followed in exercise of its adjudicatory powers. In the context of the RTI Act also, merely because the CIC, while deciding the complaints/appeals is required to hear the complainant/information seeker, would not require the CIC to hear them while punishing the erring Information Officer, in exercise of its supervisory powers.

11. We may reiterate that the complainant/information seeker has the remedy of seeking costs and compensation and thus the argument of being left remediless is misconceived. However penalty is not to be mixed with costs and compensation.

12. We are also of the view that the participation of the information seeker in the penalty proceeding has nothing to do with the principle of accountability.

13. Needless to say that if the information seeker has no right of participation in penalty proceedings, as held by us, the question of right of being heard in opposition to writ petition challenging imposition of penalty does not arise. We therefore hold that no error was committed by the learned Single Judge in reducing the penalty without hearing the appellant.

14. That brings us to the question, whether the penalty prescribed in Section 20 of the Act is mandatory and the scope of interference with such

LPA No.777/2010 Page 8 of 10 penalty in exercise of powers of judicial review under Article 226 of Constitution of India.

15. We may at the outset notice that a Division Bench of this Court in judgment dated 6th January 2011 in LPA 782/2010 titled *Central Information Commission v. Department of Posts*, in spite of the argument raised that that Single Judge ought not to have reduced the penalty imposed by the CIC but finding sufficient explanation for the delay in supplying information, upheld the order of the Single Judge, reducing the penalty. Though Section 20(1) uses the word 'shall', before the words 'impose a penalty of Rs. two hundred and fifty rupees' but in juxtaposition with the words 'without reasonable cause, malafidely or knowingly or obstructed.' The second proviso thereto further uses the words, 'reasonably and diligently'. The question which arises is when the imposition of penalty is dependent on such variables, can it be said to be mandatory or possible of calculation with mathematical precision. All the expressions used are relative in nature and there may be degrees of, without reasonable cause, malafide, knowing or reasonableness, diligence etc. We are unable to bring ourselves to hold that the aforesaid provision intends punishment on the same scale for all degrees of neglect in action, diligence etc. The very fact that imposition of penalty is made dependent on such variables is indicative of the discretion vested in the authority imposing the punishment. The Supreme Court in Carpenter Classic Exim P. Ltd. V. Commnr. of Customs (Imports)

(2009) 11 SCC 293 was concerned with Section 114 A, Customs Act, 1962 which also used the word "shall" in conjunction with expression "willful mis-statement or suppression of facts"; it was held that provision of

LPA No.777/2010 Page 9 of 10 penalty was not mandatory since discretion had been vested in the penalty imposing authority. Similarly in Superintendent and Remembrancer of Legal Affairs to Government of West Bengal V. Abani Maity (1979) 4 SCC 85, the words "shall be liable for confiscation" in section 63 (1) of Bengal Excise Act, 1909, were held to be not conveying an absolute imperative but merely a possibility of attracting such penalty inspite of use of the word "shall". It was held that discretion is vested in the court in that case, to impose or not to impose the penalty.

16. Once it is held that the quantum of fine is discretionary, there can be no challenge to the judicial review under Article 226 of the Constitution, of exercise of such discretion, of course within the well recognized limits. If this Court finds discretion to have been not appropriately exercised by the CIC, this Court can in exercise of its powers vary the penalty. In the facts of the present case, we find the learned Single Judge to have for valid reasons with which we have no reason to differ, reduced the penalty. We, therefore do not find any merits in this appeal and dismiss the same. No order as to costs.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 29, 2012

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